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No. 85-1466

In the Supreme Court of the United States

OCTOBER TERM, 1985

JET INDUSTRIES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's tort claims were barred by the discretionary function exception of the Federal Tort Claims Act, 28 U.S.C. 2680(a).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 8-13) is reported at 777 F.2d 303. The order of the district court (Pet. App. 14-18) is reported at 603 F. Supp. 643.

JURISDICTION

The judgment of the court of appeals (Pet. App. 8) was entered on November 29, 1985. The petition for a writ of certiorari was filed on February 26, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This is an action under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.* The district court granted the government's motion to dismiss, finding that the action was barred by the "discretionary function" and "misrepresentation" exceptions of the FTCA (28 U.S.C. 2680(a) and

(h)), and that the complaint failed to state a cause of action under state law (see 28 U.S.C. 1346(b), 2674) (Pet. App. 14-18). The court of appeals affirmed, relying on the discretionary function exception of the FTCA (*id.* at 8-13).

1. Petitioner is a publicly traded corporation in the business of manufacturing and distributing electric cars. It alleges that, in April 1982, one Frederix Peter De Veau purchased a controlling interest in the company and was elected chairman of its board of directors. This position gave De Veau access to petitioner's bank accounts, from which he stole $1,460,000. Pet. App. 2, 4-5.

Petitioner asserts that it did not know at the time that De Veau was on probation from federal prison and had been given a fictitious identity through the Federal Witness Protection Program (WPP). In its complaint, petitioner alleged that the government knew that De Veau was a highly successful confidence man with top crime syndicate contacts; that he was a danger to the public and had a propensity for engaging in corporate fraud and theft; that the government made it impossible, however, for members of the public to learn these facts; and that, with the encouragement of the government, De Veau falsely held himself out to the public as an experienced and honest businessman. Thus, petitioner alleged that De Veau's theft from it was caused by the government's carelessness and negligence—specifically, that the government permitted De Veau's activities when it knew or should have known they would result in petitioner's loss; that it failed to control and supervise De Veau properly when it knew that it should have and had in fact decided to do so; that it failed to warn petitioner of the danger De Veau presented; that the failure to supervise, control, and warn violated the Justice Department's policies and procedures, which require protection of the public welfare; and that the Securities and Exchange Commission

either violated its policies or had failed to adopt proper policies for this sort of situation. Pet. App. 2-7.

2. The government moved to dismiss petitioner's complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief could be granted (Fed. R. Civ. P. 12(b)(1) and (6)). The district court (Pet. App. 14-18) granted the motion, holding that the discretionary function and misrepresentation exceptions to the FTCA deprived it of subject matter jurisdiction (*id.* at 15-17), and that petitioner had failed to state an actionable claim because the government owed no duty to petitioner under the relevant state law (*id.* at 17-18).

The court of appeals affirmed (Pet. App. 8-13) on the basis of the discretionary function exception. The court determined that petitioner's claim was essentially one of negligent supervision (*id.* at 11-12), and relied on decisions from the Second, Fifth, and Eighth Circuits—as well as *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984)—in concluding that petitioner's action was barred by the discretionary function exception.[1]

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. The FTCA is a limited waiver of sovereign immunity, making the federal government liable to the same extent as a private party for certain torts of federal employees acting

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[1]In a final footnote (Pet. App. 13 n.3), the court of appeals noted that, "[b]ecause we conclude that the discretionary function exception deprived the district court of jurisdiction, we need not address the propriety of the [district] court's rulings regarding the 'misrepresentation' exception to the FTCA and the government's liability under Texas law."

within the scope of their employment. The discretionary function exception, however, precludes liability for any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused" (28 U.S.C. 2680(a)). As initially construed by the Supreme Court in *Dalehite* v. *United States*, 346 U.S. 15 (1953), the scope of the discretionary function exception is broad, covering not only federal agencies but "all employees exercising discretion" (*id.* at 33): "Where there is room for policy judgment and decision there is discretion" (*id.* at 36). This broad interpretation of the exception's scope was recently reaffirmed by this Court in *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984). There the Court stressed that "it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case" and that "the basic inquiry concerning the application of the discretionary function exception is whether the challenged acts of a Government employee—whatever his or her rank—are of the nature and quality that Congress intended to shield from tort liability" (*id.* at 813). Allegedly faulty airplane inspections were within the exception; a particular decision is not outside the exception's scope simply because it applies general agency policy or specific regulations to a given factual situation (see *id.* at 814-820; see also, *e.g.*, *Flammia* v. *United States*, 739 F.2d 202, 204 (5th Cir. 1984)).[2]

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[2]Thus, even if petitioner is correct that the Marshals Service failed to adhere strictly to internal guidelines in supervising De Veau, *Varig Airlines* makes clear that the decisions regarding his day-to-day supervision fall within the scope of the discretionary function exception where there is, as in the WPP, discretion in these day-to-day activities. Certainly discretion is involved in, for instance, determining whether any warning is called for or the type of warning to be made. See, *e.g.*,

a. Petitioner asserts that the government has violated its own guidelines (Pet. 7-11, 19) and negligently executed the operational details of its discretionary decisions (*id.* at 11-15, 19) in this case. Petitioner has, however, consistently failed to say what policies or procedures were violated. Indeed, petitioner apparently conceded in the court of appeals (Br. 14) that "the statutes impose no limit on Government discretion in determining how to, or even whether to, supervise [WPP] participants." Plainly, if petitioner can point to no guidelines, its claim that they were violated must fail.[3] Similarly, the concept of negligently executed "operational details" cannot exist in this case without an objective standard to measure the execution against; as the court of appeals observed (Pet. App. 12-13), "in the absence of specific regulations or guidelines, the greater the government's supervision of De Veau, the greater the discretion the government was required to exercise." This conclusion is correct.

b. Petitioner's response, presumably, is that it needs discovery to find unpublished, internal policies and procedures that were violated; thus, it asserts (Pet. 15-16, 19-20) that dismissal of its suit prior to such discovery was improper. The problem with this argument is twofold. First, petitioner never sought discovery prior to the district

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Dalehite v. *United States*, 346 U.S. at 41-42 (decisions with respect to contents of labeling of potentially explosive fertilizer are within the exception). Indeed, in *Varig Airlines*, the FAA, by certifying the defective aircraft, had failed to "warn" of their dangerous condition. To the extent that the pre-*Varig Airlines* decisions on which petitioner relies hold to the contrary, of course, they have been superseded.

[3]Indeed, violation of federal regulations per se cannot support a claim under the FTCA. See *Art Metal-U.S.A., Inc.* v. *United States*, 753 F.2d 1151, 1156-1157 (D.C. Cir. 1985).

court's dismissal.[4] Second, petitioner cannot rely on unpublished, internal policies and procedures as the source of an enforceable duty. In particular, the presence of internal guidelines is insufficient to transform the government's concededly broad discretion in administering the WPP into non-discretionary, "operational" housekeeping. In numerous contexts, courts have held that Department of Justice internal guidelines create no rights enforceable by third parties. See *United States* v. *Kember*, 648 F.2d 1354, 1370 (D.C. Cir. 1980) (U.S. Attorneys' Manual); *Beverly* v. *United States*, 468 F.2d 732, 746-747 (5th Cir. 1972) (internal guidelines set forth in letter to the House Judiciary Committee regarding applications for immunity); *In re Tierney*, 465 F.2d 806, 813 (5th Cir. 1972), cert. denied, 410 U.S. 914 (1973) (internal Department of Justice guidelines concerning grants of immunity); see also *United States* v. *Hsieh Hui Mei Chen*, 754 F.2d 817, 824 (9th Cir. 1985), cert. denied, No. 84-6648 (June 3, 1985).[5] As the First Circuit

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[4]At no time during the year petitioner's complaint was pending before the district court did petitioner seek discovery: On October 26, 1983, petitioner filed its complaint; on January 10, 1984, in lieu of answer, the government filed a motion to dismiss, asserting all three bases ultimately accepted by the district court; on October 25, 1984, following briefing by the parties, the district court dismissed the complaint, and its judgment was entered on October 26, 1984. In its opposition (filed March 29, 1984) to the government's motion to dismiss (at 10), petitioner stated that "[p]olicies for guidance as to particular situations exist within the Justice Department and will be the subject of [petitioner's] discovery," but discovery was never actually sought. Though this point was made below (see U.S. C.A. Br. 4 n.1), petitioner has never explained the failure.

[5]In numerous other administrative contexts as well, courts have held that similar internal agency guidelines create no rights for private individuals. See, *e.g.*, *Schweiker* v. *Hansen*, 450 U.S. 785 (1981) (Social Security claims manual); *United States* v. *Caceres*, 440 U.S. 741 (1979) (IRS electronic surveillance regulations); *Rank* v. *Nimmo*, 677 F.2d 692 (9th Cir.), cert. denied, 459 U.S. 907 (1982) (Veterans Administration lenders' handbook and circulars); *Chasse* v. *Chasen*, 595 F.2d 59 (1st Cir. 1979) (Customs Service circular concerning employee overtime); *Concerned Residents of Buck Hill Falls* v. *Grant*, 537 F.2d 29

said in *Chasse* v. *Chasen*, 595 F.2d 59, 62 (1979), "[N]ot all agency policy pronouncements which find their way to the public can be considered to be regulations enforceable in federal court"; see also *Concerned Residents of Buck Hill Falls* v. *Grant*, 537 F.2d 29, 38 (3d Cir. 1976). To hold that administrative guidelines are enforceable by third parties would " 'hamper seriously the ability of departmental administrators to communicate freely and flexibly with the employees of their departments by means of written directives' " (*Rank* v. *Nimmo*, 677 F.2d 692, 698 (9th Cir.), cert. denied, 459 U.S. 907 (1982) (quoting *Chasse* v. *Chasen*, 595 F.2d at 65 (Campbell, J., concurring)). Cf. *United States* v. *Caceres*, 440 U.S. 741, 755-756 (1979) (a rigid exclusionary rule in criminal proceedings for evidence obtained in violation of internal IRS electronic surveillance regulations "could have a serious deterrent impact on the formulation" of government standards governing law enforcement procedures). Assuming that internal guidelines exist in this case, they would create no rights for petitioner and, by the same token, could not narrow the discretion the government had.

2. Petitioner errs in arguing (Pet. 7-14) that the court of appeals' decision conflicts with the post-*Varig* decisions of other courts of appeals. First, the non-WPP torts cases the petition cites are distinguishable not only because they did

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(3d Cir. 1976) (Soil Conservation Service guidelines concerning evaluation of watershed projects). The government's decision to put De Veau in the WPP had an unquantifiably incremental impact on the probability of petitioner's injury. Cf. *Martinez* v. *California*, 444 U.S. 277, 281 (1980) (state statute granting absolute immunity to public employees who make parole decisions does not violate due process because its impact on the probability of injury by paroled prisoner to any particular member of the public is incremental; *Martinez* also stressed the remoteness of a causal nexis between the state's alleged negligence and the damage done to plaintiff by a non-state actor (*id.* at 284-285)).

not involve the WPP but also because each[6] involved either allegations of violating specific public regulations[7] or the special circumstance of negligent placement of buoys.[8] The one court of appeals opinion cited which did concern the WPP agreed that decisions concerning the selection and supervision of WPP participants are protected by the discretionary function exception and determined that the

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[6]With one exception: *Alabama Electric Coop., Inc.* v. *United States*, 769 F.2d 1523 (11th Cir. 1985), which involved whether the choice of a particular design for a dike system by the Army Corps of Engineers fell within the discretionary function exception. It is hard to see how any decision under the WPP could fail to be the sort of "social, economic or political policy decision" that the court in *Alabama Electric* distinguished from "engineering malpractice" (*id.* at 1536-1537). In a case decided the week before *Alabama Electric* and much closer to the one at hand, the Eleventh Circuit held barred by the discretionary function exception an action alleging that the FBI negligently used as an informant an individual whose violent propensities resulted in plaintiff's injury. *Ostera* v. *United States*, 769 F.2d 716 (11th Cir. 1985).

[7]*National Carriers, Inc.* v. *United States*, 755 F.2d 675, 677-678 (8th Cir. 1985) (failure to follow regulations regarding contaminated beef); *McMichael* v. *United States*, 751 F.2d 303, 306-307 (8th Cir. 1985) (munitions inspectors merely "review[ed] [a] checklist for safety compliance" and therefore did not make discretionary judgments). As discussed earlier, an unpublished, internal guideline is clearly insufficient to vest a substantive or procedural right in petitioner and to render a discretionary function non-discretionary. In any event, the discretion afforded the government under the WPP is obviously greater than that in the Eighth Circuit cases and, as discussed *infra*, the Eighth Circuit, in *Bergmann* v. *United States*, 689 F.2d 789, 792-797 (1982), has explicitly held that administration of the WPP is within the discretionary function exception.

[8]*Drake Towing Co.* v. *Meisner Marine Constr. Co.*, 765 F.2d 1060 (11th Cir. 1985); *Eklof Marine Corp.* v. *United States*, 762 F.2d 200 (2d Cir. 1985). The decisions apparently concluded that the facts were analogous to *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955), which involved a government-maintained lighthouse. While we disagree with the holdings of these courts of appeals, they are distinguishable since, under the WPP, the government's activities are clearly discretionary and not suited to judgment by an objective standard, and there is, of course, no specific reliance by the public.

WPP creates no duty to warn. *Taitt* v. *United States*, 770 F.2d 890, 893-895 (10th Cir. 1985).[9] Cases from other circuits have reached similar conclusions. See *Bergmann* v. *United States*, 689 F.2d 789, 792-797 (8th Cir. 1982); *Leonhard* v. *United States*, 633 F.2d 599, 625 (2d Cir. 1980), cert. denied, 451 U.S. 908 (1981); see also *Franz* v. *United States*, 707 F.2d 582, 586-588, later proceeding, 712 F.2d 1428, 1429-1430 (D.C. Cir. 1983). There is, accordingly, no conflict in the courts of appeals.[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[9] *Taitt* held that decisions regarding a WPP participant's selection, placement, treatment, and release were protected by the discretionary function exception, and that there was no duty to warn of a participant's dangerousness. To the extent that *Taitt* remanded for discovery as to whether government employees failed to perform a mandatory duty, this remand was in connection with statutory obligations under 18 U.S.C. 4205(e), a non-WPP statute, regarding government officials' duties to furnish the Parole Commission with information concerning prisoners eligible for parole. Although we do not agree with the remand, it suffices for present purposes to emphasize that no such statutory or regulatory obligation is at issue here.

[10] Indeed, petitioner has failed in a circuit which has, even after *Varig Airlines*, been relatively restrictive in its construction of the discretionary function exception. See *Collins* v. *United States*, 783 F.2d 1225 (5th Cir. 1986).